No. 15-10837

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARIA GRANADOS,
Plaintiff – Appellant

v.

WAL-MART STORES, INCORPORATED;
WAL-MART STORES TEXAS, L.L.C., doing business
as Wal-Mart Stores Texas 2007, L.L.C.,
Defendants – Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION, CIVIL ACTION NO. 3:14-CV-3860-G

APPELLANT'S REPLY BRIEF

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ARGUMENT & AUTHORITIES

Appellant, Maria Granados, relies upon the arguments set forth in her Appellant's Brief. Nevertheless, Granados files this Reply Brief to address certain arguments and representations made in Wal-Mart's Appellees' Brief.

I. The issue of Wal-Mart's actual knowledge was properly preserved for this Court's review.

Wal-Mart claims that Granados failed to preserve the issue of actual knowledge. Appellees' Brief at 24-26. This is incorrect.

A. An issue must first be fairly presented to the district court in order to preserve error on appeal.

Generally, "arguments not raised before the district court are waived and will not be considered on appeal." *Celanese Corp. v. Martin K. Eby Constr. Co., Inc.*, 620 F.3d 529, 531 (5th Cir. 2010). Therefore, in order to preserve an issue for appeal, it must be "fairly presented" to the district court first. *Joint Heirs Fellowship Church v. Akin*, No. 14-20630, --- Fed. Appx. ---, 2015 WL 6535336, at *4 (5th Cir. 2015) ("An issue not fairly presented to the district court is not preserved for appeal.").

B. Granados fairly presented the issue of Wal-Mart's actual knowledge to the district court.

At the district court, Wal-Mart moved for summary judgment, arguing that "there is no evidence that Defendant knew or reasonably should have

known about the danger, here water on the floor where Plaintiff fell." ROA.85. In response to Wal-Mart's motion for summary judgment, Granados presented arguments that Wal-Mart had actual or constructive knowledge of the danger to the district court. *See* ROA.101-18.

Particularly, Granados stated in her response to Wal-Mart's motion that "Plaintiff opposes Defendant's No-Evidence Motion for Summary judgment because the evidence raises a genuine issue of material fact as to whether . . . Defendant *knew* or should have known of the water on the floor." ROA.101-02 (emphasis added). In Granados's brief supporting her response, the relevant section heading was entitled "Defendant had *actual* or constructive knowledge of the condition in question." ROA.108 (emphasis added). Granados then stated the relevant legal standard: "On the date of the injury, Granados was a business invitee, and as such, Defendant owed Granados a duty to make safe any dangerous conditions on the property that Wal-Mart *knew* or should have known." ROA.109 (citing *Tex. Utils. Elec. Co. v. Timmons*, 947 S.W.2d 191 (Tex. 1997); *Motel 6 G.P., Inc. v. Lopez*, 929 S.W.2d 1 (Tex. 1996)).

Wal-Mart also incorrectly claims that "Granados did not refer to any summary judgment evidence purporting to establish Wal-Mart had 'actual

knowledge' of the water on the floor; instead Granados discussed only the alleged circumstantial evidence relating to whether Wal-Mart employees should have seen the water." Appellees' Brief at 25. However, Granados's response introduced her summary judgment evidence by specifically stating, "Plaintiff, Maria Granados, relies on the following evidence to demonstrate that Defendant Wal-Mart had *actual* or constructive knowledge of an unreasonably dangerous condition of its premises and raise a genuine issue of material fact." ROA.109 (emphasis added). Furthermore, Wal-Mart's interpretation of the evidence produced by Granados as being "only the alleged circumstantial evidence relating to whether Wal-Mart employees *should have* seen the water," is a mischaracterization of the evidence and does not determine whether Granados actually presented an argument that Wal-Mart *actually did* see the water. Appellees' Brief at 25 (emphasis added).

Finally, Granados's prayer in her summary judgment response stated that "a genuine issue of material fact exists as to whether the water on the floor was a dangerous condition and whether Defendant had *actual* or constructive knowledge of the dangerous [condition]." ROA.114. Accordingly, there is no question that Granados "fairly presented" the issue

of Wal-Mart's actual knowledge to the district court.[1] The issue of Wal-Mart's actual knowledge was, therefore, properly preserved for this Court's review.

Furthermore, because Granados's evidence, which is fully detailed on pages 19-25 of Appellant's Brief, demonstrates at least a genuine issue of material fact regarding Wal-Mart's actual knowledge, summary judgment was improper on this ground. *See* Appellant's Brief at 19-25.

II. Granados produced sufficient evidence to demonstrate at least a genuine issue of material fact regarding whether Wal-Mart reasonably should have discovered the spill before Granados fell.

Wal-Mart next argues that Granados's evidence is legally insufficient to demonstrate a genuine issue of material fact regarding Wal-Mart's constructive knowledge. Appellees' Brief at 3. However, Granados has produced enough evidence that a reasonable jury could find that Wal-Mart reasonably should have discovered the spill before Granados fell.

[1] Wal-Mart's briefing at the district court further acknowledges that Granados made an argument regarding Wal-Mart's actual knowledge. Specifically, Wal-Mart's reply in support of its motion for summary judgment responded to the evidence produced by Granados (or the lack thereof, according to Wal-Mart) regarding both Wal-Mart's actual *and* constructive knowledge. ROA.162-65.

A. Granados is not required to conclusively establish Wal-Mart's constructive knowledge.

Wal-Mart argues that Granados was required to establish constructive knowledge. Appellees' Brief at 32. However, Granados need not conclusively establish that Wal-Mart had constructive knowledge at this stage—or ever. Instead, to defeat summary judgment, Granados only needed to produce more than a "mere scintilla" of evidence. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986); *Bulk Pack, Inc. v. Fidelity & Deposit Co. of Md.*, 163 Fed. Appx. 298, 300 (5th Cir. 2006). Furthermore, this Court must view all of the evidence and any inferences to be drawn therefrom in the light most favorable to Granados in determining whether Wal-Mart is entitled to summary judgment. *Prinzi v. Keydril Co.*, 738 F.2d 707, 709 (5th Cir. 1984). Because Granados produced sufficient evidence that would allow a reasonable jury to find that Wal-Mart reasonably should have discovered the spill before Granados fell, summary judgment was not proper on this ground. *See id.; see also Templet v. HydroChem, Inc.*, 367 F.3d 473, 477 (5th Cir. 2004).

B. Wal-Mart's arguments misconstrue *Reece* and its progeny.

Wal-Mart completely disregards the evidence of its employee, Mercedes Acosta's proximity to the spill, arguing that this is no evidence of constructive knowledge simply because the spill was only on the ground for (at least) five minutes. In doing so, Wal-Mart would have this Court believe that an employee's proximity to a dangerous condition is irrelevant. However, this misconstrues the Texas Supreme Court's opinion in *Reece*. *See Wal-Mart Stores, Inc. v. Reece*, 81 S.W.3d 812, 816 (Tex. 1998).

Reece did not hold that employee proximity is wholly irrelevant to the constructive knowledge analysis. *Id.* Rather, *Reece* made clear that evidence of an employee's proximity to a dangerous condition, *alone*, is not enough to charge a premises owner with constructive knowledge. *Id.* at 813 ("[W]e must decide whether evidence that the premises owner's employee was in close proximity to the dangerous condition right before the plaintiff fell, *without more*, is legally sufficient to charge the premises owner with constructive notice. We hold that it is not, absent some evidence demonstrating that the condition existed long enough that the premises owner had a reasonable opportunity to discover it.") (emphasis added).

Accordingly, the Court should consider *all* of the relevant evidence to determine whether there is enough evidence that a reasonable jury could find that Wal-Mart had a reasonable opportunity to discover the spill. Just as the Court should not consider mere proximity of an employee alone, the Court also should not consider temporal evidence alone. After all, evidence that a dangerous condition was present for a certain amount of time is generally not instructive without more information, such as whether anyone was around the spill, and if so, what they were doing.[2]

Therefore, this Court should consider not only the nature of the spill, the length of time the spill was on the floor, and whether an employee was in proximity of the spill—but also when and *why* that employee was in proximity of the spill. This is particularly important here because Wal-Mart's employee Acosta was in the direct proximity of the spill just five minutes before the fall, *for the specific purpose of inspecting and cleaning the floor*.

[2] In *Reece*, the Texas Supreme Court suggested that a "less conspicuous hazard" than something like a "large puddle of dark liquid on a light floor" would require an employee to be in proximity for a "continuous and significant period of time" before constructive knowledge could be imputed on the premises owner. *Reece*, 81 S.W.3d at 816. However, what constitutes a "significant" amount of time depends entirely on the other circumstances surrounding the incident.

C. Collectively, the evidence at least raised a fact question as to whether it was reasonable for Wal-Mart to discover the spill five minutes before Granados fell.

Granados did not merely present evidence that a Wal-Mart "employee was in close proximity to the dangerous condition right before the plaintiff fell, without more," as in *Reece*. *Reece*, 81 S.W.3d at 813. Rather, Granados presented evidence that, taken collectively, shows there is at least a fact issue regarding constructive knowledge.

1. The spill was on the floor for at least five minutes before Granados fell.

As required by *Reece*, Granados produced evidence of how long the spill was on the floor before Granados fell.[3] The video evidence shows that Wal-Mart's employee, Mercedes Acosta, was cleaning the floor near the checkout area five minutes before Granados fell. ROA Dome 005 Video at 7:38:50 pm to 7:45:59 pm. Acosta was pushing a mop or broom near the checkout area. *Id.* At 7:40:47 pm, Acosta can be seen cleaning with the mop in the very aisle where Granados would fall five minutes later. *Id.* at 7:40:47

[3] The district court agreed. ROA.184 ("The video and Acosta's testimony provide some evidence to support the conclusion that the water was on the ground for at least 5 minutes."). Wal-Mart indicates that this finding was just the result of the district court "indulging" an inference in favor of Granados (Appellees' Brief at 18); however, that was exactly what the district court was required to do under the relevant summary judgment standard. *See Prinzi*, 738 F.2d at 709.

pm. Furthermore, Acosta confirmed that she was cleaning the aisle where Granados fell five minutes before the fall. ROA.140-41 (Acosta Dep. at 40:19-41:10). There is also no evidence to suggest that anyone created the spill after Acosta left the aisle, and Acosta agreed. *See* ROA Dome 0005 Video at 7:40:47 pm to 7:45:59 pm; ROA.142 (Acosta Dep. at 47:15-47:17).

2. Wal-Mart's employee was in direct proximity of the spill for the express purpose of inspecting and cleaning the floor five minutes before Granados fell.

The evidence shows that there is at least a fact issues as to whether Acosta should have discovered the spill. First, while Acosta was cleaning the aisle where Granados would fall just five minutes later, Acosta was charged with the specific task of cleaning the floor and looking for spills. *See* ROA.141 (Acosta Dep. at 41:8-41:16; 40:21-40:24); ROA Dome 0005 Video at 7:40:47 pm.

Furthermore, Acosta also admitted that if a spill were in the aisle—which the evidence establishes that the spill was in fact present at that time—she should have seen it. ROA.141 (Acosta Dep. at 41:23-41:25). Wal-Mart's assistant manager, Angela Salmeron, agreed, testifying that if an associate responsible for looking for spills was within three to five feet of this

particular spill, it should have been noticed. ROA.124-125 (Salmeron Dep. at 44:23-45:6).

Wal-Mart claims that the assistant manager's testimony "is just speculation and an unsupported, subjective opinion or conclusion," citing the *Threlkeld* case. Appellees' Brief at 49 (citing *Threlkeld v. Total Petroleum, Inc.*, 211 F.3d 889, 892-94 (5th Cir. 2000)). However, this testimony is distinguishable from the testimony in *Threlkeld*. In *Threlkeld*, an employee testified that if the restroom had been in the condition that the plaintiffs described it when she last inspected it, "she most certainly would have noticed it." *Id.* at 892. This Court found that the employee's statement "indicates nothing more than, that at the time [the employee] inspected the men's restroom, it was not in the condition Mr. Threlkeld alleges." *Id.* at 894.

Here, on the other hand, the assistant manager's opinion does not merely indicate that the aisle was not in the condition that Granados alleges, nor was it merely unsupported speculation. Rather, her testimony concerns whether a reasonable Wal-Mart associate *should* have discovered the spill and was based on the video evidence, the manager's personal knowledge of the store, the floor, this spill, the associate employee's duties, and other relevant facts. Accordingly, Granados provided sufficient evidence to

demonstrate at least a fact issue on Wal-Mart's constructive knowledge of the spill. [4]

D. More time would not have made a difference here because Wal-Mart already had a reasonable opportunity to discover the spill.

Wal-Mart essentially complains that finding a genuine issue of material fact here "would (1) require omniscience of a premises owner, (2) not provide a premises owner with a fair opportunity to inspect, correct, or warn invitees of the risk, and (3) impose constructive knowledge instantly, at the moment a hazard is created, and thus make a premises owner a *de facto* insurer of invitees' safety." Appellees' Brief at 48 n.18. However, the evidence shows that Wal-Mart *did* have a reasonable opportunity to inspect the area for dangerous conditions. In fact, Wal-Mart, through its employee Acosta, was engaged in that very inspection just five minutes before Granados fell. Acosta simply was *negligent* in her inspection. She should

[4] Additionally, the video reveals that a second, unidentified Wal-Mart employee should have discovered the spill during the five minute time period before Granados fell. *See* ROA Dome 0005 Video at 7:45:40 pm; *see* Appellant's Brief at 32-33. Wal-Mart disputes Granados's interpretation of this evidence, claiming that "a careful review of the video shows this employee was not in the same aisle where Granados slipped but, rather, was in the next aisle over." Appellees' Brief at 29-30. However, this simply demonstrates that there is a genuine dispute regarding a material fact.

have seen the spill because it was her job to specifically look for and correct that type of hazard.

It is unclear what more of a "reasonable opportunity to inspect" Wal-Mart would require. Indeed, there is probably no better, single activity that Wal-Mart *could* have done to discover the spill than to have an employee specifically inspect and clean the floor. However, the fact that the inspecting employee here says that she did not see the spill does not, as Wal-Mart claims, prove that it was *impossible* to discover the spill.[5] Likewise, the fact that the inspecting employee did not correct the spill does not foreclose a reasonable jury from nonetheless finding that the employee acted unreasonably in failing to do so. Instead, this shows that there is at least a question of fact as to whether she *should* have discovered and corrected the spill.

[5] Wal-Mart points out that the district court stated in its opinion that "[i]f anything, Acosta's failure to see the puddle highlights how inconspicuous it was." Appellees' Brief at 48 (quoting ROA.185). However, the district court is not permitted to make credibility determinations or weigh the evidence when considering a motion for summary judgment. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000); *Sturdivant v. Target Corp.*, 464 F. Supp. 2d 596, 599-600 (N.D. Tex. 2006). Granados produced evidence that either Acosta did or should have discovered the spill, but Acosta claimed that she did not discover the spill. Instead of finding that there was a genuine issue of material fact on this issue, as it should have, the district court made an improper determination that Acosta's testimony was more credible than other evidence.

Wal-Mart's entire defense rests upon its argument that five minutes is not, as a matter of law, enough time for a premises owner to discover a spill like this one. However, it seems that more time would not have made a difference here. Acosta was doing the very thing that would allow Wal-Mart to discover the spill—it just happened to occur only five minutes before Granados fell, and Acosta just happened to do it negligently.

If this evidence—that a premises owner's employee was specifically cleaning the exact area five minutes before the plaintiff fell and nonetheless failed to discover the spill—does not raise at least a *fact issue* to allow the evidence to be presented to the jury, then there is essentially no premises liability in Texas.[6]

E. Wal-Mart's proposed rule would lead to absurd results in cases like this one.

A black-and-white rule regarding how long a water spill must be on the floor before constructive knowledge can be imputed to a premises owner would lead to absurd results in premises liability cases. Indeed,

[6] Arguably, if Granados did not have video evidence of Wal-Mart's employee inspecting and cleaning the area five minutes before Granados fell, this would perhaps be a different story. However, the video evidence, coupled with the testimony of Wal-Mart's employees and managers, demonstrates, at the very least, a genuine issue of material fact that should be submitted to a jury for ultimate determination.

reasonableness determinations like this one are necessarily fact-intensive inquiries, and as such, are best suited for a jury's determination. *See Reliable Consultants, Inc. v. Jaquez*, 25 S.W.3d 336, 342 (Tex. App.—Austin 2000, pet. denied).

Nevertheless, Wal-Mart interprets *Reece* and its progeny to mean that, as a matter of law, a premises owner can *never* have constructive knowledge of a clear spill that has been on a light tile floor for five minutes, regardless of any other circumstances. In fact, Wal-Mart's brief includes a chart, which, according to Wal-Mart, lists a series of lengths of time that are *not*, as a matter of law, a sufficient amount of time for a premises owner to discover a "less conspicuous hazard like the water at issue here." Appellees' Brief at 47. These time periods range from "a few seconds" all the way up to "forty-five minutes." *Id.*

Thus, under Wal-Mart's proposed rule, a premises owner like Wal-Mart could never have constructive knowledge of a "less conspicuous hazard like water," unless it had been on the floor for *over forty-five minutes*—

regardless of any other facts.[7] Under this hard and fast rule, Wal-Mart could rest assured that it will never be liable under a constructive knowledge theory when its employees act unreasonably while inspecting the store for hazards—so long as the injured customer happens to get hurt less than forty five minutes after the employee did a poor job inspecting. This cannot be what the Texas Supreme Court intended in *Reece*.

Notably, however, Wal-Mart has not produced a single case with facts like this one; *i.e.*, where an employee specifically charged with inspecting and cleaning the floor was in direct proximity of a spill, failed to correct the spill, and the court found no evidence of constructive knowledge. Granados's evidence raises at least a fact issue regarding Wal-Mart's constructive knowledge. Therefore, Wal-Mart is not entitled to summary judgment on this ground.

[7] Other relevant facts may include, as here, evidence that one of Wal-Mart's employees had been in direct proximity of the spill within the first five minutes for the specific purpose of discovering hazards.

III. Granados has presented sufficient evidence to demonstrate a genuine issue of material fact regarding whether the condition was unreasonably dangerous.

Finally, Wal-Mart argues that Granados "presented no evidence that would be probative of whether the aisle in front of the $79 display posed an unreasonable risk of harm on the day she slipped." Appellees' Brief at 54.

A. Granados is not required to conclusively establish that the spill posed an unreasonable risk of harm.

Granados was not required to conclusively establish that the spill posed an unreasonable risk of harm on the day Granados fell. Instead, Granados was only required to show that a genuine issue of material fact exists, such that a reasonable jury could return a verdict for her. *See Templet*, 367 F.3d at 477; *see also Anderson*, 477 U.S. at 248. Because Granados produced sufficient evidence to demonstrate at least a fact issue regarding whether the spill posed an unreasonable risk of harm to Granados, this issue should be reserved for the jury. *See Reliable Consultants, Inc.*, 25 S.W.3d at 342 ("It is important to note that reasonableness determinations such as [whether premises conditions present an unreasonable risk of harm] are fact-intensive inquiries and, as such, are issues well-suited for a jury's determination."); *see also* State Bar of Tex., Tex. Pattern Jury Charges:

Malpractice, Premises, Products, PJC 66.4 (2014) (whether "the condition posed an unreasonable risk of harm" is a question for the jury to decide under the premises liability pattern jury charge for an invitee plaintiff).

B. Wet, indoor floors generally pose an unreasonable risk of harm to invitees.

Wal-Mart's argument is inconsistent with well-established precedent concerning what constitutes an unreasonably dangerous condition. "A condition is unreasonably dangerous if it presents an unreasonable risk of harm." *Pipkin v. Kroger Tex. L.P.*, 383 S.W.3d 655, 671 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (citing *Brinson Ford, Inc. v. Alger,* 228 S.W.3d 161, 163 (Tex. 2007) (per curiam). "A condition poses an unreasonable risk of harm for premises-defect purposes when there is a 'sufficient probability of a harmful event occurring that a reasonably prudent person would have foreseen it or some similar event as likely to happen.'" *County of Cameron v. Brown,* 80 S.W.3d 549, 556 (Tex. 2002) (quoting *Seideneck v. Cal Bayreuther Assocs.*, 451 S.W.2d 752, 754 (Tex. 1970)). "[F]oreseeability does not require that the exact sequence of events that produced an injury be foreseeable," but only the "general danger." *Brown*, 80 S.W.3d at 556. Again, "[b]ecause this definition precludes a definitive, objective test, the extent to which a

condition is unreasonably dangerous is ordinarily a fact question." *Christus Health SE. Tex. v. Wilson,* 305 S.W.3d 392, 397 (Tex. App.—Eastland 2010, no pet.).

Numerous courts, including the Texas Supreme Court have determined that a foreign substance on a floor is some evidence of an unreasonably dangerous condition. *See, e.g., Brookshire Grocery Co. v. Taylor*, 222 S.W3d 406, 409 (Tex. 2006) (noting that an ice cube on a grocery store floor was unreasonably dangerous); *Pipkin*, 385 S.W.3d at 672 (holding that evidence of water on the floor is some evidence of an unreasonably dangerous condition); *see also Wal-Mart Stores, Inc. v. Sparkman*, No. 02-13-00355-CV, 2014 WL 6997166, at *3 (Tex. App.—Fort Worth Dec. 11, 2014, pet. filed) (mem. op.) ("Texas courts have consistently found that indoor wet floors can pose an unreasonably dangerous condition.").

In *Rosas v. Buddies Food Store,* a patron fell as he entered a store. 518 S.W.2d 534, 536 (Tex. 1975). It had been raining and the sidewalks were wet. *Id.* The plaintiff walked through an automatic door with a mat immediately inside the entrance. *Id.* As he stepped off the mat, his foot slipped on water and he fell. *Id.* The patron filed suit and the trial court granted summary judgment in favor of the store. *Id.* The court of appeals affirmed, holding

"that the wet floor did not amount to a dangerous condition or one involving an unreasonable risk or harm, but was, in fact, a normal result of the rain and that 'under all of the facts presented by this appeal the danger, if any, was open and obvious and there was no duty.'" *Id.*

The Texas Supreme Court, however, reversed the judgment and remanded the case for trial. The Court disagreed with the court of appeal's holding that a wet floor is not dangerous but is just a normal condition of life on a rainy day. *Id.* at 537. This was not the relevant inquiry. Instead, whether a condition is unreasonably dangerous turns on whether a reasonably prudent person "could foresee that harm was a likely result of a condition." *Id.* The Court held that a jury could reasonably find that water on the floor in an entranceway is unreasonably dangerous. *Id.* at 538. Specifically, the Court held that water on the floor is not open and obvious and that "reasonable minds could differ as to the dangerous character of the wet floor." *Id.* Similarly here, a jury could easily find that a puddle of water on a light tile floor created an unreasonably dangerous condition for Granados.

C. There is at least a fact issue regarding whether the water spill in this case was unreasonably dangerous.

Wal-Mart's attempts to argue that the spill was not dangerous because it was an "inconspicuous puddle" and "near a checkout display," (Appellees' Brief at 51 n.20), only further demonstrate how dangerous this puddle was to Granados. Indeed, the video evidence shows that Granados slipped in the puddle without ever seeing it. ROA Dome 005 Video at 7:45:38 to 7:45:59 pm. The puddle was located in a cramped area of the store with lots of displays and narrow checkout aisles. *Id.* Generally, customers walking through the checkout area are not monitoring the floor, but rather searching for an open register or looking at the displays. *See, e.g.*, ROA Dome 005 Video at 7:38:50 pm to 7:45:59 pm. [8]

The incident report completed by Wal-Mart's assistant manager, Angela Salmeron, evidences that the floor was not "clean" and not "dry" at the time Granados fell. ROA.149. Wal-Mart argues that this report is no

[8] Wal-Mart notes that there is no evidence that anyone else fell in this same puddle, arguing that "Texas courts addressing this issue typically consider whether the record contains evidence of other falls attributable to the same condition and evidence of the defectiveness of the condition causing the fall." Appellee' Brief at 51-52. However, evidence of other falls attributable to the same condition is not necessary to show that a condition was unreasonably dangerous.

evidence of an unreasonable risk of harm. Appellees' Brief at 55. However, a jury could reasonably find that a not "dry" floor in a store poses an unreasonable danger to patrons. *See Rosas*, 518 S.W.2d at 538. Furthermore, Wal-Mart's store manager, Sharon Laws, testified that water was visible in the photos taken by Wal-Mart of the scene after Granados was injured and that the spill was approximately six inches by six inches. ROA.131-132 (Laws Dep. at 13:14-13:25).

Moreover, the video evidence of Wal-Mart's efforts to clean up the spill demonstrates that the spill may have been even larger than six inches by six inches. In the video, Wal-Mart employee Acosta can be seen using many paper towels to wipe up the water next to the "$79" display. ROA Dome 0007 Video at 7:55:24 pm to 8:00:25 pm; Dome 0005 Video at 7:54:20 pm to 7:59:10 pm. Acosta cleaned the spill off and on for at least five to six minutes, amassing a large pile of soiled paper towels. ROA Dome 0007 Video at 7:55:24 pm to 8:00:25 pm.[9] And at 8:14:44 pm, a male Wal-Mart employee

[9] Wal-Mart claims that the used paper towels appear to be dry in the video. Appellees' Brief at 46. However, again, this demonstrates that there is a question of fact here and that this issue should be submitted to the jury.

lifted and moved the pallet so that Acosta could continue cleaning the liquid. ROA Dome 0005 Video at 8:14:44 pm.

Finally, Wal-Mart's own employee testified that a spill on the store's floor is a dangerous condition. Acosta testified that spills on the floor of Wal-Mart are dangerous and agreed that they pose a threat to customers. ROA.138-139 (Acosta Dep. at 28:21-29:4); *see Nat'l Convenience Stores, Inc. v. Erevia*, 73 S.W.3d 518, 523 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (considering store manager's testimony "that water on floors was recognized as a hazard because it endangered the safety of employees and customers and potentially exposed the company to lawsuits" in evaluating whether a spill constituted dangerous condition). Acosta's testimony is relevant, despite Wal-Mart's argument that it "established only generalizations about spills at this store," (Appellees' Brief at 55), because Granados has not merely presented evidence that the floor *could* be slippery. Rather, taken in conjunction with the undisputed evidence that there was a puddle of liquid on the floor, Acosta's testimony further demonstrates that the puddle would be dangerous to patrons like Granados. Accordingly, this evidence would allow a reasonable jury to conclude that the spill was unreasonably dangerous at the time Granados fell.

D. The cases cited by Wal-Mart are distinguishable and are therefore not probative of whether this spill was unreasonably dangerous.

Wal-Mart has not presented any case or evidence that conclusively proves that the spill in this case was not unreasonably dangerous. The cases that Wal-Mart cites in support of its argument are distinguishable. *See Dietz v. Hill Country Rests., Inc.*, 398 S.W.3d 761 (Tex. App.—San Antonio 2011, no pet.); *Sova v. Bill Miller Bar-B-Q Enter., Ltd.*, No. 03-04-00679-CV, 2006 WL 1788231 (Tex. App.—Austin June 30, 2006, no pet.) (mem. op.). These cases do not even involve facts similar to this case, and therefore are not probative of whether the condition here was unreasonably dangerous.

In *Dietz*, the condition was a permanent, boot-shaped depression in an aggregate walkway made of pebbles and concrete. *Dietz*, 398 S.W.3d at 767. The plaintiff testified that she fell when she stepped into the depression and lost her balance. *Id.* However, the plaintiff testified that she had personally walked on the walkway on "several prior occasions and did not have a problem with the walkway in the past." *Id.* The plaintiff's mother also testified that they had never had a problem with the walkway during previous visits. *Id.* Additionally, the manager of the business stated that the walkway had been unchanged for at least eighteen years and that "tens of

thousands" of people had walked on the walkway without incident for at least twelve years. *Id.* Based on those facts alone, the court concluded that the plaintiff failed to raise a genuine issue of material fact regarding the existence of a condition posing an unreasonable risk of harm.

Dietz's facts are nothing like this case. First, this was not a permanent condition like a depression in a walkway. Rather, this was a temporary spill, which the evidence shows was on the floor for at least five minutes before Granados fell. Accordingly, there is no testimony from a Wal-Mart manager that the spill had been unchanged for years or that thousands of people had managed to walk over the spill without ever falling. Second, there is no evidence here that Granados or her family members had personally walked over the spill on several prior occasions without falling. Accordingly, the *Dietz* case has no probative value here. *See Reliable Consultants, Inc.*, 25 S.W.3d at 342.

The *Sova* case cited by Wal-Mart is also not instructive here. First, *Sova* somewhat conflates the analysis of whether there was an unreasonably dangerous condition with whether the premises owner had actual or constructive knowledge of the condition. *See Sova*, 2006 WL 1788231, at *3-7. Additionally, *Sova* deals more with whether a store's method of display,

e.g., a condiment bar or soda machine, can itself constitute an unreasonably dangerous condition because it causes items or water to become floor hazards. *Id.* at *4-7. The court ultimately determined that the condiment bar was not "an unreasonably dangerous condition about which [the premises owner] knew or should have known" because even "[a]ssuming that the floor surrounding the condiment bar was 'generally slippery,' or that ice occasionally fell from the condiment bar to the floor . . . this is not evidence of an unreasonably dangerous condition that existed on the day or at the time that Sova fell." *Id.* at *7.

On the other hand, the *only* evidence about the actual puddle on the floor in *Sova* was the plaintiff's testimony that after she fell she "saw a small puddle of clear liquid on the floor near the condiment bar, and the wet spot on her jeans felt cool to the touch." *Id.* at *3. Accordingly, the court held that "there is no evidence to support the conclusion that Bill Miller had actual or constructive knowledge of the puddle on the floor as a dangerous condition." *Id.* at *4.

Here, the unreasonably dangerous condition was not a condiment bar or other display but, rather, the actual puddle of water on the floor.[10] And there is significantly more evidence that the puddle was unreasonably dangerous than just self-serving testimony from a plaintiff, as in *Sova*.

Accordingly, Granados produced sufficient evidence to demonstrate at least a genuine issue of material fact regarding whether the spill was unreasonably dangerous and Wal-Mart is not entitled to summary judgment on that ground.

PRAYER

For the foregoing reasons, Appellant Maria Granados prays that this Court reverse the district court's order granting summary judgment and remand for a trial on the merits. Granados further prays for any other relief to which she may be justly entitled in law or equity.

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[10] Wal-Mart implies that the spill was not unreasonably dangerous "simply because it [was] not foolproof." Appellees' Brief at 50 (quoting *Brinson Ford, Inc.*, 228 S.W.3d at 163). However, the context for that statement originally involved whether something that creates hazards, such as a soda machine that drops ice on the floor, could be considered an unreasonably dangerous condition, itself. *See Brookshire Grocery Co. v. Taylor*, 222 S.W3d 406, 408 (Tex. 2006). In *Brookshire*, the Texas Supreme Court determined that the soda machine was not unreasonably dangerous, despite being "not foolproof" since it might occasionally drop ice on the floor. However, the Court held that the ice cube itself was an unreasonably dangerous condition. *Id.* at 409.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this *Appellant's Reply Brief* has been forwarded to the following via the Federal Rules of Civil Procedure on this 25th day of February, 2016.

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